

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case has been before the Board on prior appeals. By decision dated August 11, 1999, the Board affirmed a September 16, 1996 OWCP decision denying a claim for a recurrence of disability.² Appellant had filed a claim for an injury on October 16, 1979 when he lifted a heavy bag in the performance of duty as a painter. On July 11, 1980 the claim was accepted for an aggravation of a back condition.³ Appellant returned to work as a custodial worker and he filed a recurrence of disability claim commencing May 16, 1994.

By decision dated September 16, 1996, OWCP denied the recurrence of disability claim. The Board affirmed, finding that the medical evidence was insufficient to establish the recurrence claim. As the Board noted, a May 25, 1994 report from Dr. Daniel Clua, a Board-certified anesthesiologist, did not provide a rationalized medical opinion. In addition, a June 18, 1994 report from Dr. Marta Roa-Degracia, an attending physician Board-certified in physical medicine and rehabilitation, was insufficient to establish a recurrence of disability.

In a decision dated October 19, 2009, the Board affirmed a September 5, 2008 OWCP decision regarding a claim for reconsideration.⁴ The Board found that appellant's May 10, 2006 application for reconsideration was untimely and failed to show clear evidence of error.

By order dated July 25, 2012, the Board remanded the case to OWCP. The Board noted that the record contained a July 10, 2000 letter from appellant, and additional medical evidence that had been received on July 31, 2000. OWCP had not determined whether this was sufficient to constitute a timely request for reconsideration within one year of the Board's August 11, 1999 decision.⁵ The case was remanded for a determination on this issue.

With respect to the medical evidence of record, appellant had submitted a June 12, 2000 report from Dr. Avelino Guterrez, a neurologist, who stated that appellant had suffered a "labor accident" on October 16, 1979 and since then had experienced low back pain. Dr. Guterrez stated that appellant was treated in 1996 and the diagnosis was chronic articular syndrome L5-S1. He stated that this diagnosis and lumbar degeneration were "sufferings associated with old lumbar traumas" and therefore "we directly associate it with the 1979 labor accident."

In a report dated July 4, 2000, Dr. Clua stated that appellant had an injury on October 16, 1979 when he lifted a 90-pound bag of sand. He indicated that diagnostic testing from 1993 through 1999 revealed L5-S1 radiculopathy, disc degeneration, diminished disc space, and right

² Docket No. 97-2880 (issued August 11, 1999).

³ The document accepting the claim reported the medical diagnosis as a lumbar muscle strain, but described the accepted condition as an aggravation of a preexisting condition. The claims examiner also found appellant had been returned to work December 12, 1979. A June 26, 1980 report from Dr. Ira Wiggins, a family practitioner, stated that appellant had back pain on and off for several years prior to October 17, 1979.

⁴ Docket No. 11-2004 (issued October 19, 2009).

⁵ *Supra* note 2.

L5-S1 facet syndrome. Dr. Clua stated that all of the above spoke to a traumatized lumbar spine and the only antecedent was the employment injury.

On June 29, 2005 OWCP received an undated report from Dr. Hector Crooks, an orthopedic surgeon, who indicated that on October 14, 2003 appellant had undergone an L5-S1 discectomy, but appellant continued to have low back pain.

OWCP prepared a statement of accepted facts (SOAF) and referred the case to an OWCP medical adviser, for review of Dr. Crooks' report and an opinion as to whether appellant's current back condition was causally related to the employment injury. In a report dated December 7, 2005, an OWCP medical adviser, Dr. Nabil Angley, stated that Dr. Crook's report did not report any additional back injury since the 1979 employment injury, and appellant presented a continuation of symptoms since that time. He stated that it was his impression that the claimant's current condition was due to the original December 16, 1979 injury.

On July 27, 2006 OWCP prepared a new SOAF. It stated the claim had been accepted for lumbar strain and aggravation of scoliosis, and described appellant's duties as a custodial worker from October 1980 to May 1994. The SOAF also indicated that OWCP had previously determined the aggravation had ceased by December 12, 1979.⁶ In a report dated August 2, 2006, Dr. Angley stated that he had not been aware that appellant worked full duty as a custodian from October 1980 to May 16, 1994. He stated that no correlation was made between the L5-S1 discectomy and the 1979 employment injury, as they occurred many years after appellant had worked symptom-free as a custodian. Dr. Angley concluded that appellant's problems in 1994 were not causally related to the employment injury.

In a report dated September 21, 2009, Dr. Ignacio Romero, a neurologist, provided a history that appellant had a back injury in 1979, and did not return to work after performing light duty until June 1980. He provided results on examination and diagnosed failed back surgery, L5 and S1 nerve root injury, spondyloarthrosis, and degenerative discopathy with stenosis at L3-4 and L4-5. Dr. Romero opined that appellant was permanently disabled.

In a report dated January 7, 2010, Dr. Rolando Chin, an orthopedic surgeon, provided a history that appellant sustained an injury on October 16, 1979 lifting a 90-pound bag. He stated that appellant had received numerous orthopedic treatments for chronic low back pain. Dr. Chin provided results on examination and diagnosed, with respect to the back, lumbosacral severe osteoarthritis, herniated discs L2-3 and L5-S1, and neurogenic lesions L1-4.

By decision dated December 18, 2012, OWCP determined that appellant had timely filed a request for reconsideration. It denied modification with respect to the recurrence of disability claim commencing May 16, 1994, finding that the medical evidence was insufficient to establish the claim.

On May 31, 2013 appellant requested reconsideration. He submitted a February 26, 2013 report from Dr. Guiterrez, stating that his June 12, 2000 report was incorrect in stating that

⁶ The record contains an April 6, 1983 decision finding that appellant's job-related aggravation had ceased by December 12, 1979.

appellant was first seen in 1996. Dr. Guiterrez stated that appellant was seen on March 3, 1994 and treated for low back pain. He reported that an April 7, 1994 MRI scan showed chronic articular syndrome L5-S1 and bilateral facet hypertrophy. Dr. Guiterrez stated that the “May 16, 1994 incident was a result of a rude movement that has caused him much more pain in his low back (lumbosacral column).” Dr. Guiterrez opined that appellant’s diagnoses, “including any rude movement associated with old lumbar traumas; therefore, I directly associate this event with the October 16, 1979 labor accident.”

In a decision dated September 6, 2013, OWCP denied modification. Appellant requested reconsideration and submitted a report dated March 5, 2014 from Dr. Nicolas Rodriguez, an orthopedic surgeon, stating that appellant had an October 16, 1979 injury lifting a heavy bag. Dr. Rodriguez stated that an x-ray had shown a mild scoliosis, and appellant should have returned to full duty on June 16, 1980, but the doctor “revoked his decision” and appellant was moved to another location. He listed a number of physicians treating appellant prior to April 24, 1994, and stated, “In this chronology it concludes the relation that has cause and effect of the occurred work accident of October 16, 1979 and the level of his subsequent aggravation is of a persistence lesion of the low lumbar column, in which during the period of time that have passes it has become chronic -- systematic and has caused a permanent impairment to the patient life style.”

By decision dated April 15, 2014, OWCP reviewed the case on its merits and denied modification. It found that the medical evidence was insufficient to establish the claim for a recurrence of disability.

On May 27, 2014 appellant requested reconsideration. He stated that he was not fit to return to work on October 7, 1980 and OWCP should pay compensation for disability prior to that date. Appellant stated that his employment-related aggravation had not ceased.

By decision dated June 25, 2014, OWCP found the request was insufficient to require merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means “an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”⁷

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that

⁷ 20 C.F.R. § 10.5(x).

the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁸

ANALYSIS -- ISSUE 1

Appellant sustained a back injury in the performance of duty on October 16, 1979 when he lifted a heavy bag. The record indicates that appellant returned to work as a custodian in October 1980 and that he continued to work until May 16, 1994. The issue presented in this case was a claim for a recurrence of disability on May 16, 1994. A recurrence of disability is a spontaneous change in an employment-related condition. To establish the claim, appellant must establish that there was an employment-related condition on or after May 16, 1994. He must then establish that the condition caused disability which affected the position he was performing as of May 16, 1994.

The record contains a number of medical reports, but the probative value of the evidence is critical. The evaluation of probative value of medical evidence requires a consideration of the opportunity for and the thoroughness of the physician's examination. The evaluation must also consider the accuracy and completeness of the physician's knowledge of the facts and medical history. Finally, the analysis and medical rationale expressed in support of the physician's opinion must be sound.⁹ As to the question of whether appellant had an employment-related condition as of May 16, 1994 or thereafter, the Board notes that there are numerous diagnoses presented in the medical record. For example, Dr. Guterrez diagnoses chronic articular syndrome L5-S1 and lumbar degeneration; Dr. Clua diagnoses L5-S1 radiculopathy, disc degeneration, and facet syndrome; Dr. Romero diagnoses spondyloarthrosis and degenerative discopathy with stenosis; Dr. Rodriguez refers to an aggravation of lumbar lesion; Dr. Chin diagnoses osteoarthritis, herniated discs L2-3 and L5-S1, and neurogenic lesions L1-4.

None of these physicians provide an opinion, based on an accurate history and supported by sound medical reasoning, establishing causal relationship with these diagnoses and the October 16, 1979 employment injury. Dr. Guterrez refers to diagnosed conditions as associated with "old lumbar traumas" without providing further explanation or identification. Dr. Rodriguez states that the "chronology" of treatment indicates a cause and effect. While appellant sustained an injury on October 16, 1979 that fact does not establish that all subsequent back treatment and diagnoses are related to that employment injury. Chronology is not causation.

In addition, the physicians of record do not address the specific issue of disability on May 16, 1994 affecting appellant's work. There is no discussion of the job duties appellant was performing as of May 16, 1994. Dr. Guterrez mentions the date in his February 26, 2013 report, but refers to some sort of movement by appellant. If he is referring to some specific incident at work on May 16, 1994, that has not been established by the record. Alternatively, if Dr. Guterrez is attributing any disability to a new work incident, this would be a claim for a new

⁸ Robert H. St. Onge, 43 ECAB 1169 (1992); Dennis J. Lasanen, 43 ECAB 549 (1992).

⁹ Gary R. Sieber, 46 ECAB 215 (1994).

injury, even if an aggravation of a prior injury.¹⁰ He does not provide any further detail or explanation.

OWCP referred the case to an OWCP medical adviser for an opinion in 2005 and 2006. The medical adviser initially provided a brief opinion supporting causal relationship, but this opinion appears to be based on a limited review of the factual and medical evidence. After a more detailed SOAF and additional review of the medical evidence, he opined in an August 2, 2006 report that appellant's condition as of 1994 was not employment related as a recurrence.

The Board finds that the evidence of record, while documenting a continuing back condition, does not establish that the condition is employment related. Moreover, it does not establish that an employment-related condition caused disability for appellant working in a custodian position on or after May 16, 1994.

On appeal, appellant states that errors have been made with respect to his claim. He refers to a finding that the aggravation had ceased December 12, 1979 and that he was found fit for full-duty work on October 7, 1980. The issue in this case is a recurrence of disability commencing May 16, 1994. For the reasons stated above, the Board finds that appellant did not meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹¹ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."¹² 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹³

ANALYSIS -- ISSUE 2

In this case, appellant submitted an application for reconsideration on May 27, 2014. He did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered. Appellant referred to periods of disability prior to October 1980.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1550.3(c)(5) (June 2013).

¹¹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

¹² 20 C.F.R. § 10.606(b)(3).

¹³ *Id.* at § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

The issue in this case, as noted in Issue 1, was a recurrence of disability as of May 16, 1994. As to new and relevant evidence, the relevant issue is medical. Appellant did not submit any new and relevant medical evidence on reconsideration.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered by OWCP. Accordingly, OWCP properly declined to review of the merits of the claim for compensation.

CONCLUSION

The Board finds that appellant has not established a recurrence of disability on or after May 16, 1994 causally related to an October 16, 1979 employment injury. The Board further finds OWCP properly denied his application for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 25 and April 15, 2014 are affirmed.

Issued: January 7, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board